Supreme Court, U. S.
FILED
FEB 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-5932.

JOHN DOE and JANE ROE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

MOTION TO DISMISS OR AFFIRM.

REGINA MULLEN SMALL,
State Solicitor,
JOHN A. PARKINS, JR.,
ROGER A. AKIN,
THOMAS M. LAPENTA,
TIMOTHY A. CASEY,
Deputy Attorneys General,
820 N. French Street,
Wilmington, Delaware. 19801
(302) 571-2520
Counsel for Appellee.

February 1980

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE	2
THE QUESTIONS ARE INSUBSTANTIAL	9
A. The Delaware TPR Statute Is Not Unconstitutionally Vague and Indefinite	9
B. Extraordinary Standards of Proof Are Not Required in TPR Proceedings Because of the Competing Interests of the Children	14
C. The Termination Proceedings Do Not Constitute a Denial of Substantive Due Process	19
CONCLUSION	23

TABLE OF CITATIONS.

Cases:	Page
Addington v. Texas, — U. S. —, 99 S. Ct. 1804 (1979)	15, 18
Alsager v. District Court, 406 F. Supp. 10 (S. D. Iowa 1975) aff'd on other grounds, 545 F. 2d 1137 (8th Cir. 1976)	13, 14
In re Cager, 251 Md. 473, 248 A. 2d 384 (1968)	14
Chaunt v. United States, 364 U. S. 350 (1960)	17
Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472 (1908)	11
Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974)	9, 15
Cline v. Hartzler, 227 A. 2d 210 (Del. 1967)	10
Matter of D.T., 89 S. D. 590, 237 N. W. 2d 166 (1975)	14
Davis v. Smith, — Ark. —, 583 S. W. 2d 37 (1979)	13
In re Dingee, 328 A. 2d 139 (Del. 1974)	11
In re E., 239 A. 2d 626 (Del. 1968)	10
In the Matter of Five Minor Children, 407 A. 2d 198 (Del. 1979)	11
In re Fusco, 127 A. 2d 468 (Del. Orph. 1956)	10
Ginsberg v. New York, 390 U. S. 629 (1968)	16, 21
Gonzales v. Landon, 350 U. S. 920 (1955)	17
In re Hernandez, 53 Ariz. App. 32, 530 P. 2d 389 (1975)	17
Matter of Keyes, 574 P. 2d 1026 (Okla. 1978)	13
Lake Carriers' Assn. v. MacMullan, 406 U. S. 498 (1972)	11
Matthews v. Eldridge, 424 U. S. 319 (1976)	15
In re Metteer, 203 Neb. 515, 279 N. W. 2d 374 (1979)	14
Meyer v. Nebraska, 262 U. S. 390 (1923)	9, 15, 20
Moore v. East Cleveland, 431 U. S. 494 (1977)	9
Morrissey v. Brewer, 408 U. S. 471 (1972)	15
Nelson v. Murray, 211 A. 2d 842 (Del. 1965)	10
Nichika v. Dulles, 356 U. S. 129 (1958)	17
In re One Minor Child, 295 A. 2d 727 (Del. 1972)	10
Pierce v. Society of Sisters, 268 U. S. 510 (1925)	9, 19, 20
Prince v. Massachusetts, 321 U. S. 158 (1944)	9
Quilloin v. Walcott, 434 U. S. 246 (1978)	9, 10, 22
Roe v. Conn, 417 F. Supp. 769 (M. D. Ala. 1976)	13
Sanchez v. Texas Department of Human Resources, 581 S. W. 2d 260 (Tex. 1979)	13

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Schneiderman v. United States, 320 U. S. 118 (1942) 17
Smith v. Organization of Foster Families, 431 U. S. 816 (1977) 10, 16, 17, 21, 22
Smith v. Smith, 45 A. 2d 879 (Del. Super. 1946) 10
Stanley v. Illinois, 405 U. S. 645 (1972) 9, 16, 21
State v. McMaster, 259 Ore. 291, 486 P. 2d 567 (1971) 14
In the Matter of Three Minor Children, 406 A. 2d 14 (Del. 1979) 10, 11, 12
In the Matter of Two Minor Children, 231 A. 2d 475 (Del. 1967) 10
Warwick v. Addicks, 157 A. 205 (Del. Super. 1931) 15
In re William L., 477 Pa. 322, 383 A. 2d 1228 cert. denied 439 U. S. 880 (1978) 14
In re Winship, 397 U. S. 358 (1970) 15
Wisconsin v. Yoder, 406 U. S. 205 (1972) 9, 19, 20
Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966) 17

Statutes:

13 *Del. C.* § 772(a) 12
13 *Del. C.* § 1104 13
13 *Del. C.* § 1113 10
31 *Del. C.* ch. 3 2
62 *Del. Laws* c. 12
Ill. Rev. Stat. ch. 40 § 1501(1)(D) 12
Mich. Comp. Laws Ann. § 722.23 (Supp. 1976) 12
10 *O. S.* 1971, § 1130A.(3)(a) 13
Constitution of the United States:
First Amendment 13, 20
Fourteenth Amendment 10

Other:

J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interest of of the Child*, 105-111 (1973) 16, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-5932.

JOHN DOE and JANE ROE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE.

MOTION TO DISMISS OR AFFIRM.

The appellee respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to require further argument.

STATEMENT OF THE CASE.

John Doe and Jane Roe, appellants, are the natural parents of the five minor children who are the focus of this matter.[1] The appellee Division of Social Services of the Delaware Department of Health and Social Services (Division) has the duty to seek out minors in need of care and protection in Delaware. 31 *Del. C.* ch. 3.

On several occasions in the years prior to the institution of TPR proceedings in 1975, the Family Court of the State of Delaware awarded legal custody of Doe and Roe's children to the Division. Finally after a full five day hearing at which evidence was adduced concerning the family's chaotic and nomadic home environment, Doe's poor employment record, his criminal record and history of alcohol problems, as well as Roe's emotional detachment from the children, the Superior Court terminated Doe and Roe's parental rights having found them unfit parents and having concluded that such action was in the best interests of Amy, Bill, Charles, David and Ellen.[2] The Delaware Supreme Court affirmed.

---

1. Doe is the half-brother of Roe. Although not married, they lived together and held themselves out to the community as husband and wife (Roe was known as Mrs. Doe) at all time relevant to this action. Their children Amy, Bill, Charles, David and Ellen ranged in age from four years to nine months old when the TPR (termination of parental rights) action was filed in 1975. These children are now nine to five and a half years of age. They have not had any contact with their parents since 1975. Roe is now married to another man and lives with his child in Delaware. Doe presently lives in Georgia. He has not lived in Delaware for more than a year. All that Doe and Roe presently seek is "contact" with their children. See Affidavits of Doe and Roe in Support of Motion to Proceed in Forma Pauperis in this action.

2. The Superior Court previously had entered an order terminating parental rights solely on the basis of Doe and Roe's criminal incestuous relationship. The Delaware Supreme Court remanded with directions to consider whether termination was "in the best interests of the children."

The Division had a long history of providing supportive services to the Doe family. Early in 1972, Doe asked the Division to help find a place for Roe, Amy, and him to live.[3] After the birth of Bill, Doe and Roe asked the Division in September 1972 to provide a "decent home" for the children.[4] Doe had been fired from his job and the family had been evicted from its home and was living in a single room at a roominghouse.[5] On occasion, both before and after September 1972, Doe and Roe received public assistance (even at times when their children were in foster care).[6] When they were initially denied cash assistance in September 1972, their social worker made arrangements for Doe to have a fair hearing to challenge the denial.[7] After the Family Court approved the voluntary transfer of custody agreement, the children were placed in foster homes where they remained for about six months.[8] When Doe and Roe brought their marital difficulties to the attention of the Division they were referred to the marriage counseling service at Catholic Social Services.[9]

While Amy and Bill were in the Division's custody, Doe became intoxicated. He was violent and disruptive and, according to a complaint filed by Roe, threatened to kill her and accused her of running around with other men. As a result Doe was admitted to the Delaware State Hospital for treatment. After ten days, Doe signed himself out of the hospital. He was given medication and

3. Tr. 58.
4. Tr. 64.
5. Tr. 122-123.
6. Tr. 496-497.
7. Tr. 125-126.
8. Tr. 129.
9. Tr. 124.

referred to out-patient services at the mental hygiene clinic near his home but only kept one appointment.[10]

The Division continued its frequent contacts with Doe and Roe after Amy and Bill were placed in foster care,[11] visiting them several times a month and working with them so that the children could be returned to their home as soon as possible. After the Does made adequate housing arrangements, Amy and Bill were returned home in early 1973.[12] Doe had found new employment and the family was renting a "nice" home.[13] A week after Amy's return Doe quit his job, found another from which he was soon fired, and the family moved from the home in the middle of the night.[14] Doe then found work on a local dairy farm and the family moved into a tenant's cottage on the farm. While the house was "fairly decent" and adequate for the Does, their sister, her four children and her boyfriend moved in with them. The three bedroom house then accommodated two couples and six young children.[15] Within a month to six weeks Doe was fired for being unreliable. His employer could not depend on him to get in on time to milk the cows.[16]

The Does continued to drift from one abode to another, usually living in minimally adequate to poor housing. Between 1972 and 1974 alone, they lived in nineteen separate locations in eleven different towns.[17] During that

10. Tr. 62-63, 184.

11. Tr. 123-124. The social worker observed that the Does "didn't seem overly concerned about the placement of the children." Tr. 123.

12. Tr. 129.

13. Tr. 128.

14. Tr. 130; 142-143.

15. Tr. 130-131.

16. Tr. 66-70; 117-118.

17. Tr. 141-142.

period Doe worked only intermittently.[18] He held several jobs for between one day and two weeks.[19] Doe was discharged at times for drunkenness.[20] Other times he quit for no apparent reason and without another job prospect. He quit one job just after the birth of Charles, the third child.[21] Doe left other jobs at times when he lacked the money to pay the family's rent.[22]

Due to Doe's sporadic employment record the family was often in dire financial need.[23] The Division, in addition to providing public assistance on several occasions, periodically arranged for emergency cash assistance so that they could purchase food or assisted them in obtaining food from other sources.[24]

In 1973 three individuals familiar with the Doe's home life, including one of their sisters with whom they had shared living quarters, volunteered to Doe's social worker that he had been sexually toying with two year old Amy.[25] The Division petitioned the Family Court to remove Amy, Bill and Charles from the home. That petition was granted.[26] A criminal complaint alleging sexual assault was filed against Doe. He and Roe then fled to Maryland. During their four month absence from Delaware neither Doe nor Roe inquired about the welfare of their children.[27] After a trial, the Family Court convicted Doe of the lesser

18. Tr. 65; 79-82; 87.
19. Tr. 141-143; 189.
20. Tr. 142; 184
21. Tr. 185.
22. Tr. 182.
23. Tr. 71; 85.
24. Tr. 132.
25. Tr. 155.
26. Tr. 136.
27. Tr. 138.

included crime of offensive touching and of the crime of child neglect.[28] The Does continued to live in Maryland for about a year after Doe's conviction and they made one contact with Amy, Bill and Charles during that period.[29]

After a while the Doe's returned to Delaware with their infant twins David and Ellen. In February 1975 custody of those children was granted to the Division after Doe was convicted of the crime of incest.[30]

The Division social worker who worked closely with the Does between 1972 and 1974 concluded on the basis of her observation of Doe and Roe, that they simply lacked the capacity to provide their children with basic care. She noted that Roe never demonstrated a strong emotional attachment with her children.[31] That observation was confirmed by another social worker who described Roe's relationship with her children as "detached."[32] The only strong familial attachment which the Division was able to observe existed between Doe and Amy. That relationship was characterized as "unhealthy," though.[33]

Testimony of three expert witnesses at trial definitively established that Doe and Roe were incapable of

28. Tr. 77; Two witnesses testified at the Family Court trial that Doe repeatedly had "French kissed" Amy over her verbal objections and one of these witnesses also testified that he had directed this two year old on many occasions to expose her vaginal area and encouraged her to engage in acts of sexual self-gratification. Ex. 24 to TPR hearing. Tr. 515. An expert child psychologist who testified at the TPR hearing stressed the harmful effects on the child when a parent fails to channel and help his child sublimate infantile sexual urges. Tr. 17-18; 30-32.

29. Tr. 79.

30. Tr. 91; 111.

31. Tr. 140.

32. Tr. 168.

33. Tr. 140.

adequately caring for their children and that it was in the children's best interests that the termination petition be granted. Adaline R. Kinkaid, a psychologist, observed and tested the five children of Doe and Roe. She determined that Amy, the oldest child, was frightened and insecure and still bore the scars of her earlier experiences. However, Amy had been able to form a psychological bond with her foster parents and was secure in her present foster home.[34] Miss Kinkaid and the two psychiatrists who testified at the trial agreed that Amy's poor abilities in the area of social skills contrasted sharply with her average to superior intellectual abilities.[35]

Bill was found to have overcome his difficulties and was not as emotionally damaged as Amy, who spent more years in the home of Doe and Roe than her siblings.[36] Charles, who was mildly retarded, appeared to be settled in his present home but lacked the ability to adjust to further changes. David and Ellen, the twins who had lived most of their lives in foster homes, were characterized as normal children whose needs were being met in their present environment.[37]

Dr. T. Richard Huxtable, Jr., Chief of Forensic Psychiatry at the Delaware State Hospital, concluded that Doe and Roe were incapable of raising children.[38] He characterized Doe as a "sociopath" who lacked a sense of responsibility to a degree that was "overwhelming."[39] Both Dr. Huxtable and Dr. Charles Cook, a child psychiatrist, ascribed the lessening of appellants' chronic

34. Tr. 238.
35. Tr. 29; 186; 237.
36. Tr. 238.
37. Tr. 239.
38. Tr. 182.
39. Tr. 187.

pattern of instability to the fact that they were no longer subject to the stresses of parenthood.[40] Dr. Cook determined that Doe and Roe lacked the capability to function as nurturing parents as well as the ability to develop adequate parenting skills.[41] He described the environment which appellants had provided their children as "chaotic."[42]

As appellants indicate, Dr. Malvin Gelof, a psychologist, expressed his belief that Doe and Roe were sufficiently intelligent to raise children.[43] He could not, however, explain why appellants had not been able to provide a less than chaotic environment for their children in the past nor whether a termination order would be in the children's best interests.

After this evidence was considered by the Superior Court, it concluded that Doe and Roe were incapable of providing proper care for their children, citing the parents' employment records, the frequent changes in home surroundings, the moral atmosphere of the home where the criminal incestuous relationship continued in contravention of the order of the Family Court and the offensive touching conviction of Doe for toying with Amy. In their totality these facts provide ample evidence to support a finding that termination was in the best interests of the children. These same facts show Doe and Roe's unfitness to continue to exercise parental authority over the children. The Delaware Supreme Court did not err in affirming the judgment of the trial court in terminating Doe and Roe's parental rights.

---

40. Tr. 35-36; 196.

41. Tr. 20. Dr. Cook testified that the geographic and emotional instability of the Does indicated an inability to provide the nurturance and stability required for even average human infant development. Tr. 15-17.

42. Tr. 30.

43. Tr. 457.

On behalf of Amy, Bill, Charles, David and Ellen, appellee earnestly requests the Court to give finality to that judgment and thereby permit the permanent placement of these children who have not known their biological parents for five years. Do not condemn them to the limbo of impermanent foster family relationships simply so these parents, now settled in other lives without them, can re-institute "contact" with them.

THE QUESTIONS ARE INSUBSTANTIAL.

A. The Delaware TPR Statute Is Not Unconstitutionally Vague and Indefinite.

It is axiomatic that a state must tread carefully when it seeks to alter the integrity of the family.[44] Nonetheless, it is also well established that neglectful parents may be separated from their children. *Stanley v. Illinois*, 405 U. S. 645, 652 (1972). Here, substantial evidence has established that the interests of the parents in retaining parental rights is inimical to the "best interests" of these children. Proof of both parental unfitness and the fact that termination lies in the best interests of Doe and Roe's children clearly satisfies the requirements of the Due Process Clause

44. Appellants cite the Court to a series of cases which restrict state intrusion into family life. However, none of them reflect the central familial issue in a TPR proceeding, the inherent conflict between the interests of the parents and the children. *Compare* Quilloin v. Walcott, 434 U. S. 246 (1978) (statute declares unwed fathers unfit as matter of law); Prince v. Massachusetts, 321 U. S. 158 (1944) (statute prohibits minor's sale of religious literature); Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974) (school regulations require early termination of pregnant teachers); Moore v. East Cleveland, 431 U. S. 494 (1977) (ordinance prohibits extended families in single family dwellings); Wisconsin v. Yoder, 406 U. S. 205 (1972) (mandatory school attendance laws conflict with religious principles); Pierce v. Society of Sisters, 268 U. S. 510 (1925) (school attendance laws preclude parochial school attendance); Meyer v. Nebraska, 262 U. S. 390 (1923) (state law prohibits teaching in German language).

of the Fourteenth Amendment to the United States Constitution. In *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978), this Court cited an earlier concurrence by Mr. Justice Stewart which set forth the following dual proof requirement in cases such as this one:

> We have little doubt that the Due Process Clauses would be offended "(if) a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families,* 431 U. S. 816, 862-863, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977).

The dual fitness/best interests test had become a settled principle of Delaware TPR law long before *Smith.*[45]

The Delaware Supreme Court has been careful to explicate these terms so that they are comprehensible by parents and their application by the trial court cannot be

---

45. Parental unfitness has been statutory ground for protecting children since 1907. In re Three Minor Children, 406 A. 2d 14, 16 (Del. 1979). Both unfitness and the best interests must be shown in a TPR. Cline v. Hartzler, 227 A. 2d 210 (Del. 1967). The best interest factor in TPR's is presently codified at 13 *Del. C.* § 1113. The best interest test has been applied consistently by Delaware courts when dealing with issues affecting the custody and control of children. *See e.g.* Smith v. Smith, 45 A. 2d 879 (Del. Super. 1946) (custody; good of child is "primary or leading consideration"); In re Fusco, 127 A. 2d 468 (Del. Orph. 1956) (TPR; "best welfare of the child is the paramount concern"); Nelson v. Murray, 211 A. 2d 842 (Del. 1965) (custody; "paramount concern is the present and future welfare of the children"); In re Two Minor Children, 231 A. 2d 475 (Del. 1967) (visitation; best interest of children is "primary consideration"); In re E., 239 A. 2d 626 (Del. 1968) (TPR; best interests of child is "prime and overriding concern."). In re One Minor Child, 295 A. 2d 727 (Del. 1972) (visitation; best interests of child supercedes "desires of parents.").

arbitrary. In doing so, the Delaware Supreme Court has ensured that the evils in the statute of which appellants complain: failure to give adequate warning of proscribed conduct and standardless and discriminatory application, cannot occur. Assuming *arguendo* that the statutory language is unconstitutionally vague on its face, that imprecision may be cured by narrowing court interpretations. *Lake Carriers' Assn. v. MacMullan*, 406 U. S. 498 (1972).

The Delaware Supreme Court has held that the common, ordinary dictionary meaning of the statutory phrase "not fitted" should be used in applying the TPR statute. ". . . [A]s to matters pertaining to custody of children, [the words 'not fitted'] are to be read generally as meaning 'unfitted for parental duties'." *In re Dingee*, 328 A. 2d 139, 140 (Del. 1974). Furthermore, the Delaware Supreme Court twice has cited with approval the following standards adopted in *Clarke v. Lyon*, 82 Neb. 625, 633, 118 N. W. 472, 475 (1908): a) concern the parent has shown in the past for the children; b) the suitability of the parents' domestic surroundings to receive the children; and c) the children's general welfare. *In re Dingee, supra; In the Matter of Three Minor Children*, 406 A. 2d 14, 17 (Del. 1979). Additionally, the Delaware Supreme Court held below that:

> Unfitness cannot be based on poverty and lifestyle which do not reflect a lack of concern for and ability to care for the children or an unwillingness to receive the children as part of a family. *In the Matter of Five Minor Children*, 407 A. 2d 198, 200 (Del. 1979).

The difficulty in drawing an absolute statute which could cover all examples of parental unfitness, a problem highlighted by the Delaware Supreme Court in *Dingee* and *Five Minor Children*, is patent when one looks to the

statutes to which appellants point as exemplars.[46] Neither of their terms is any more precise than the Delaware statute.

Nor is the "best interest" standard impermissibly imprecise. In fact, the Delaware Supreme Court has suggested that the relevant factors in a custody proceeding provide a good basis for assessing the "best interest" of a child in a TPR setting. *In the Matter of Three Minor Children, supra* at 19. These relevant factors include: the interaction and interrelation of the child with his parents, his siblings and others who may significantly affect his interests; the child's adjustment to his home, school, and community; and, the mental and physical health of the individuals involved. *See* 13 *Del. C.* § 772(a). The application of those factors here confirms the result of the trial court.

The conflict which appellants would create in the decisions of the courts which have considered TPR statutes under attack for vagueness does not commend itself to

---

46. Appellants contend that the Michigan legislature has successfully managed to give explicit guidance to parents in its child custody statute. Mich. Comp. Laws Ann. § 722.23 (Supp. 1976). A close examination of the Michigan scheme, however, demonstrates its necessary lack of specificity. If Doe and Roe concede the appropriateness and acceptability of the Michigan law (a custody statute), they cannot attack the Delaware TPR statute. The Michigan law is replete with terms which necessarily require judicial explication. The terms "other emotional ties", satisfactory environment", "moral fitness", and "mental health" which are in that statute are clearly not explicit. The final factor to be considered by the Michigan domestic courts, i.e. "any other factor considered by the court to be relevant," is an emphatic endorsement of the holding of the Supreme Court of Delaware in this case. The Illinois "unfit person" statute referred to in a footnote at p. 15 of the Jurisdictional Statement is similarly composed of necessarily broad terms ("failure to maintain a reasonable degree of interest", "substantial neglect", "other neglect", etc.) Ill. Rev. Stat. ch. 40 § 1501 (1)(D).

this Court's attention. *Alsager v. District Court,* 406 F. Supp. 10 (S. D. Iowa 1975) *aff'd. on other grounds,* 545 F. 2d 1137 (8th Cir. 1976) is a judicial aberration.[47] Misapplying a strict vagueness test analogous to that employed in analyzing criminal statutes or those which chill protected First Amendment speech, the *Alsager* court overlooked or ignored the significance of the child's right to be free from an empty if not damaging "family" situation. For the state, or a legal guardian,[48] institutes a TPR proceeding not for its own benefit but for that of the child. To require a strict vagueness analysis is to condemn children who are neither abandoned nor seriously physically abused to suffer for an ideal called family integrity when the very dynamics of that concept do not lend themselves to precise definition.

Alsager stands appropriately alone in its analysis. The vast majority of state courts have refused to follow its teachings.

In *Matter of Keyes,* 574 P. 2d 1026 (Okla. 1978), the Supreme Court of Oklahoma upheld a statute which permitted termination if a parent

> [F]ailed to give the child parental care or protection necessary for his physical or mental health. 10 *O. S.* 1971, § 1130 A. (3)(a).

The Court was "not persuaded by the *Alsager* case . . . nor the reasoning of *Roe v. Conn* . . . ." *Id.* at 1029. Similarly, the Texas Court of Civil Appeals in *Sanchez v. Texas Department of Human Resources,* 581 S. W. 2d 260 (Tex.

---

47. Only Roe v. Conn, 417 F. Supp. 769 (M. D. Ala. 1976) and Davis v. Smith, — Ark. —, 583 S. W. 2d 37 (1979) purport to follow *Alsager.*

48. 13 *Del. C.* § 1104.

1979) specifically refused to follow *Alsager* in reviewing a TPR appeal.

Other state courts have rejected vagueness attacks on statutes because their respective TPR laws provide basic standards which the "average intelligent person can understand" [49] or which can be "commonly grasped." [50] Some state courts which rejected vagueness challenges prior to *Alsager* were not swayed by the same rationale.[51]

The Court should dismiss this appeal because of the clear lack of a substantial constitutional question. The almost universal refusal to follow *Alsager* is recognition that

> . . . [U]nlike criminal statutes in which the interests of only one set of individuals is involved, the constitutional issue must be examined with the interests of both the child and the parents. What might be unconstitutional if only the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests. *State v. McMaster,* 259 Ore. 291, —, 486 P. 2d 567, 569 (1971).

B. Extraordinary Standards of Proof Are Not Required in TPR Proceedings Because of the Competing Interests of the Children.

The children have the same or a greater stake in the outcome of TPR proceedings than their parents. Conse-

---

49. Matter of D. T., 89 S. D. 590, 596, 237 N. W. 2d 166, 169 (1975); In re William L., 477 Pa. 322, 383 A. 2d 1228, cert. denied 439 U. S. 880 (1978).

50. In re Metteer, 203 Neb. 515, 279 N. W. 2d 374 (1979).

51. E.g., In re Cager, 251 Md. 473, 248 A. 2d 384 (1968); State v. McMaster, 259 Ore. 291, 486 P. 2d 567 (1971).

quently, application of the standard of proof sought by the appellants in the state courts—beyond a reasonable doubt—would constitute a denial of due process to the children. Indeed any standard other than a preponderance of the evidence would violate the children's rights.[52]

The requirements of the Due Process Clause in TPR proceedings, like any other application, are not rigid and inflexible. The appellee, of course, agrees that the freedom to maintain a natural family is a liberty interest protected by the Due Process Clause. *See, e.g., Cleveland Board of Education v. LaFleur,* 414 U. S. 632, 639-40 (1974); *Meyer v. Nebraska,* 262 U. S. 390 (1923). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U. S. 471, 481 (1972). The specific dictates of the Due Process Clause in any given situation involve consideration of certain distinct factors, including the private interests which will be affected. *Matthews v. Eldridge,* 424 U. S. 319, 335 (1976). The nature of the competing interests governs the standard of proof applied. One of the private interests involved here—that of the children—requires that any standard of proof other than a preponderance of the evidence be avoided.

The standard of proof is used to allocate the risk of error between the litigants. *Addington v. Texas,* — U. S. —, 99 S. Ct. 1804, 1808 (1979). In classes of cases where an erroneous verdict generally has no more serious consequences for either party, the preponderance of evidence is applied as the standard of proof. *In re Winship,* 397 U. S. 358, 371 (1970) (Harlan, J., concurring). Thus, unless one class of litigants will be more substantially

52. The standard of proof in most civil proceedings in Delaware is a preponderance of the evidence. Warwick v. Addicks, 157 A. 205 (Del. Super. 1931).

injured by an erroneous decision than the competing class of litigants, the preponderance of evidence is the appropriate standard to apply. The standard of proof in TPR proceedings, therefore, turns on the relative weight of the interests of the parties.

The interests of the children require that the preponderance of evidence standard be applied in TPR proceedings. Although the state is the nominal party in such proceedings, it represents the interests of the children. *See Stanley v. Illinois,* 405 U. S. 645 (1972).[53] The state has a transcendent interest in protecting the welfare of its minor children. *Ginsberg v. New York,* 390 U. S. 629, 641 (1968). It is these interests—which entail the right to a stable life free from physical and emotional abuse and neglect—which are at least equal to (if not paramount to) the interests of the parent.[54] J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child,* 105-111 (1973).

There is no rational basis to conclude that the interests of the parents are so superior to those of the children so as to require an extraordinary standard of proof before their extinction.[55] Whatever due process safeguards attach

---

53. At no time have the appellants contested the right of the state to terminate parental rights in appropriate cases. Although appellants may contest the conclusions drawn by the Delaware courts in this case, they do not contest the authority of the state to seek to protect the children's interests.

54. Certainly the interests of abused and neglected children are adverse to those of the parents who desire to maintain the already fractured familial relationship. *See* Smith v. Organization of Foster Families, 431 U. S. 816, 857 n. 1 (1977) (Stewart, J., concurring) (foster children may have interests adverse to foster parents in decision to relocate foster children).

55. In their Jurisdictional Statement appellants suggest no reason why the parental interests might be superior to those of the children.

to these parental interests, they become attenuated when those interests are opposed by the interests of the children. *See Smith v. Organization of Foster Families,* 431 U. S. 816 (1977). Necessarily this is always the case in contested TPR proceedings. A weighing of the relative importance of the parental interests vis-a-vis the interests of the children is properly a legislative function. Thus state statutory schemes requiring or permitting TPR applications to be decided on the basis of the preponderance of the evidence represent a legislative determination that the interests of the parents are not paramount to those of the children. *In re Hernandez,* 53 Ariz. App. 32, 530 P. 2d 389 (1975).[56]

Appellants virtually ignore the interests of the children in their Jurisdictional Statement. Rather they cite a number of cases[57] involving extraordinary standards of proof. These cases, however, have little or no relationship to the instant matter. Each of the cases cited by appellants involves the balancing of the interests of an individual litigant against those of society as a whole. But in TPR proceedings the interests to be balanced are not diffused among the general public; they are the interests of the children who have a direct and immediate stake in the outcome of the proceeding.

---

56. The legislative branch is free to make such policy decisions. In Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966)—relied upon by appellants (Jurisdictional Statement, p. 17)—the Court applied a clear and convincing standard of proof only after determining that "Congress has not addressed itself to the question of what degree of proof is required in deportation proceedings." 385 U. S. at 284.

57. Appellants cite: Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966); Chaunt v. United States, 364 U. S. 350 (1960); Nichika v. Dulles, 356 U. S. 129 (1958); Gonzales v. Landon, 350 U. S. 920 (1955); and Schneiderman v. United States, 320 U. S. 118 (1942) (Jurisdictional Statement 16).

Even if the appellants' failure to consider the interests of the children is overlooked, their argument is still unpersuasive. Appellants place primary emphasis on *Addington v. Texas*, — U. S. —, 99 S. Ct. 1804 (1979) to support their claim that the state must prove the children's case beyond a reasonable doubt in TPR proceedings.[58] *Addington* refused to apply that standard for several reasons which are applicable here.

First, the *Addington* Court noted that in a civil commitment state power is not exercised in a punitive sense. Likewise, TPR proceedings are not conducted to punish the parent; rather they are expressly intended to protect the best interests of the child.

Second, the Court also found that the inquiry in a commitment proceeding is very different from that in a criminal proceeding. In criminal cases the standard is straight-forward: did the accused commit the crime alleged. But the Court noted that in civil commitment proceedings, the inquiry is not so clear. Given the lack of certainty and the fallibility of psychiatric diagnosis, the Court concluded that it was doubtful a state could ever

58. Throughout the course of the state court proceedings, appellants consistently argued that "beyond a reasonable doubt" was the appropriate standard; they never argued that a lesser extraordinary standard of proof, such as "clear and convincing", was appropriate. The substance of appellants' arguments are reflected in the Delaware Supreme Court's opinion, which considered only the beyond a reasonable doubt standard. Quite properly, the Delaware courts never considered the clear and convincing standard since appellants never argued in favor of its adoption.

Appellants do not expressly urge the adoption of the clear and convincing standard in their Jurisdictional Statement. However, to the extent that such argument is subsumed in the argument they have presented, it should be rejected since it has never been fairly presented to the state courts.

Appellee hastens to emphasize, however, that the interests of the children require rejection of *any* extraordinary standard of proof.

prove its case beyond a reasonable doubt. Similarly, given the necessity for subjective evaluations in TPR proceedings it would be impossible for a state to prove the children's case beyond a reasonable doubt. Thus, the sought-after standard would completely frustrate any statutory scheme permitting termination of parental rights.

C. The Termination Proceedings Do Not Constitute a Denial of Substantive Due Process.

Appellants now contend [59] that substantive due process requires that the state establish a compelling state interest before terminating their parental rights. This argument misapprehends the due process clause; the state need only establish that termination is reasonably related to a legitimate state purpose. Moreover, the evidence in this case clearly establishes a compelling state interest in the termination of the parents' rights.

Previous decisions of this Court indicate that the compelling state interest test is not applicable here. Rather the test is whether the termination is reasonably related to a legitimate state purpose. In *Pierce v. Society of Sisters,* 268 U. S. 510 (1925) the Court considered the validity of a state statute requiring children to attend public schools.[60] The statute was challenged, *inter alia,* on the

59. During the course of the proceedings in the state courts, appellants did not make any substantive due process argument. The substantive due process arguments now presented to this Court were not timely made to the Delaware Supreme Court. Appellants did not even mention substantive due process until after the Delaware Supreme Court had issued its opinion when they filed their motion for reargument. The Appellants' brief accompanying that motion includes 1½ pages of argument pertaining to substantive due process. Since it was presented for the first time on a motion for reargument it was not fairly raised in the state courts.

60. *Pierce* has been characterized as "perhaps the most significant (statement) of the Court in this area. . . ." Wisconsin v. Yoder, 406 U. S. 205, 232 (1972).

ground that it interfered with the family relationship. The Court responded by applying the reasonable relationship test. It wrote:

> Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, 43 Sup. Ct. Rep. 625, 67 L. Ed. 1042, 29 A. L. R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no *reasonable relation to some purpose within the competency of the state.*

(268 U. S. at 534-5) (emphasis added).

The significance of *Pierce* was underscored in *Wisconsin v. Yoder,* 406 U. S. 205 (1972) wherein the Court sustained a free exercise challenge by Amish parents who refused to send their children to public or private school. In arriving at its conclusion, the Court recognized that ordinarily only a reasonable relationship to some legitimate state purpose is required for a state to interfere with a familial relationship. However, the Court distinguished the case then before it solely on the basis that it also included a First Amendment claim.[61] No such claim is presented here. It is therefore clear from *Yoder* that the reasonable relation test is applicable here.

---

61. The *Yoder* Court wrote in pertinent part:

> [W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. (406 U. S. at 233)

It is beyond question that the welfare of children is a legitimate concern of the state. *See, e.g., Ginsberg v. New York,* 390 U. S. 629 (1968). This Court has recognized that the severance of a familial relationship may be necessary to preserve the welfare of a child. *Stanley v. Illinois,* 405 U. S. 645 (1972) (dictum); *Smith v. Organization of Foster Families,* 431 U. S. 816 (1977) (dictum). Thus termination proceedings are reasonably related to a legitimate state purpose.

The question thus is whether the termination in the instant case bears a reasonable relationship to the welfare of the children. The record manifests such a relationship. Appellant's contention that no harm was done to these children is false. The record of the five-day proceedings in this case indicates that the parents had shown themselves to be incapable of providing these children with any sort of stable, nurturing environment. These parents made nineteen changes of residence between eleven different localities within a two-year period. Many of these residences were with other families in grossly over-crowded housing arrangements. The father was shown to have sexually toyed with his four-year-old daughter, resulting in a conviction for offensive touching. The two oldest children were in a voluntary foster placement for an extended period of time prior to the birth of the third child. The parents were engaged in an ongoing incestuous relationship throughout the case.

It can clearly be seen from these facts and the rest of the record that the mental, emotional and physical health of these children would have been placed in serious jeopardy had their parents' rights not been terminated. The State took repeated action to attempt to improve the children's living conditions prior to termination. Finally, termination proceedings were instituted to ensure these

children the greatest possibilities for maximum continuity of personal relationships, surroundings and environmental influences. Had it not terminated these rights, the children would most probably have been placed in prolonged foster care, while their parents attempted to resolve their problems which they had made no inroads against during the three years prior to the TPR. The detriment to children caused by the continued impermanence and uncertainty in their placement seems obvious. J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests of the Child* (1973).

The showing in the state courts and the principles applied by those courts comport with the substantive requirements of due process. In *Smith v. Organization of Foster Families,* 431 U. S. 816 (1977), Mr. Justice Stewart espoused the following view in a concurring opinion:

> If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'

(431 U. S. at 862-3) (Stewart, J., concurring). This view was later adopted by the full court in *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978) (dictum). In the instant case the state courts have required and found a showing of unfitness of the parents. This showing establishes a reasonable relationship between the termination and a legitimate state purpose. Thus, the requirements of the Due Process Clause are satisfied.

CONCLUSION.

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

REGINA MULLEN SMALL,
State Solicitor,
JOHN A. PARKINS, JR.,
ROGER A. AKIN,
THOMAS M. LAPENTA,
TIMOTHY A. CASEY,
Deputy Attorneys General,
820 N. French Street,
Wilmington, Delaware 19801
(302) 571-2520

Counsel for Appellee.

FEBRUARY 1980